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RESOURCES

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ENHANCING RESPONSES TO DOMESTIC VIOLENCE

PROMISING
PRACTICES FROM
THE JUDICIAL
OVERSIGHT
DEMONSTRATION
INITIATIVE

Prosecuting Witness Tampering, Bail Jumping, and Battering From Behind Bars



Dear Colleagues,

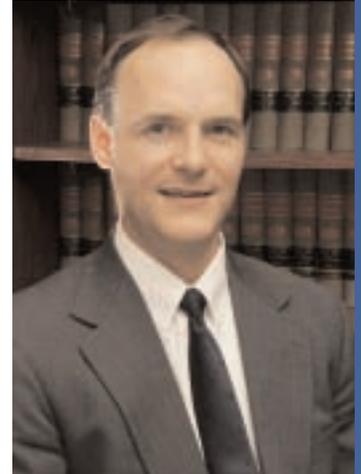
This publication highlights some innovative responses for better assuring the safety of victims during the pretrial phase of domestic violence criminal cases. In particular, it describes how one jurisdiction uses inmates' telephone calls from jail to expose domestic abuse well beyond a victim's initial report of assault or battery.

Across the nation, prosecutors are emphasizing the need for collecting further evidence, in addition to facts typically contained in police reports. As police officers gather more such evidence, they are exposing power and control dynamics and giving prosecutors more tools to explain to juries how a particular criminal act fits into the larger context of an abusive relationship. National investigative protocols that promote "evidence-based" techniques and strategies steer police, prosecutors, judges, and probation agents even further in the right direction: handling domestic violence cases as homicide prevention.

Inmate telephone calls from jail and prison open an evidentiary window into the minds of offenders. If you have never listened to jailhouse phone call evidence before, you may be astonished by the manipulation and control techniques employed by domestic violence offenders. You may even want to use the enclosed DVD—a short news segment about such calls—as a training tool. Your audience will understand the pressure, manipulation, control, and intimidation that some victims suffer.

The Office on Violence Against Women and the Vera Institute of Justice deserve lots of thanks for bringing you this information. I hope you find this publication helpful. More importantly, I hope your jurisdiction considers using this source of evidence as part of its regular practice. Prosecutors will find themselves pursuing new types of domestic abuse charges, such as bribery, victim/witness intimidation, solicitation to commit perjury, and solicitation to commit false swearing. When facing confrontation issues, inmate phone calls will also provide a new source of "forfeiture of wrongdoing" evidence.

But beyond gains in holding more offenders accountable, I hope that this publication promotes greater understanding of the abuse suffered by victims.



— *Paul Dedinsky,*
Assistant District
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Domestic Violence
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District Attorney's
Office

Introduction

The period between arrest and trial can be an especially dangerous and intimidating time for victims in cases of intimate partner violence.¹ It is also a time when the criminal justice system's legal control over defendants is limited. In most jurisdictions, defendants are released on bail while awaiting trial. And despite the court's imposition of "no contact" conditions of bail for a majority of defendants (see box on No-

Contact Orders on page 8), experience has shown that the pretrial phase (between arrest and the trial) is the time when an accused person is most likely to try to influence the victim's testimony and the outcome of a case.² Some attempts to influence victims appear to be desperate pleas for forgiveness; others clearly involve threats of physical harm or death. Some attempts even take place while defendants are in custody.

An offender's attempt to influence a victim is criminal behavior. For the past five years, the Office of the District Attorney in Milwaukee County, Wisconsin, has focused on this criminal behavior in an attempt to hold offenders accountable for the harassment, intimidation, and abuse suffered by victims during the pretrial phase of criminal cases involving domestic violence.³ As a result, prosecutors now believe that one of the biggest safety gaps in the criminal justice system's response to domestic violence can be closed by seeking convictions for witness tampering, witness intimidation, and violations of bail conditions such as failure to appear in court and disregarding no-contact orders.

This publication explains how prosecutors—in conjunction with advocates, law enforcement, court and probation

personnel, and victims themselves—can increase the safety of victims by actively investigating and prosecuting accusations of pretrial intimidation and abuse.

The Judicial Oversight Demonstration Initiative

In 1999, three jurisdictions—Dorchester District in Boston, Massachusetts; Milwaukee County, Wisconsin; and Washtenaw County, Michigan—embarked on an ambitious effort to improve criminal justice and community responses to domestic violence. The Judicial Oversight Demonstration (JOD) Initiative, funded by the U. S. Department of Justice's Office on Violence Against Women and managed by the Vera Institute of Justice, brought together in each site judges and defense attorneys and prosecutors, advocates for women and batterer intervention specialists, probation agents, police, and others to develop new ways to enhance victim safety and the oversight of offenders in their communities.

Five years later, each jurisdiction's efforts reflect their particular local circumstances and needs. This paper is a part of a series that explores the innovations in Dorchester, Milwaukee, and Washtenaw so that other jurisdictions can learn from their experience.

For more information about the Judicial Oversight Demonstration Initiative, or to view other publications in the Enhancing Responses to Domestic Violence series, visit www.vera.org/jod.

¹ The risk may be even higher if the defendant sees the case as evidence that the victim is trying to leave the relationship. Studies show that half of all murders of wives by husbands take place within two months of a separation—far less time than the four to 14 months it usually takes for criminal cases to be resolved.

² Throughout this document we use the terms "victims" and "offenders" but have omitted the qualifier "alleged" for the sake of brevity. We acknowledge that offenders are considered innocent under the law until there is an official finding on the case.

³ Domestic violence is a broad term of which intimate partner violence is one component. Most of the innovations discussed in this document address intimate partner violence but may have application for the broader cases as well.

Witness Tampering and Intimidation

Across the nation, some victims of domestic violence have come to believe that the criminal justice system—police, prosecutors, judges, and probation agents—simply cannot protect them. This feeling is intensified when victims continue to be threatened and harassed by the defendant after an arrest has been made. For this reason, many victims actively avoid cooperating with the criminal justice system.

When victims withdraw from participating in a case, and the case lacks other supporting evidence, it is likely to be dismissed. Case dismissals create frustration among prosecutors, police officers, judges, and other criminal justice practitioners who may not have specialized training in the issues of domestic violence. The perception that defendants go free because victims recant or fail to appear in court can lead to misguided “victim blaming.” To help address this misdirected frustration, prosecutors in Milwaukee County, Wisconsin, have developed a method to help expose the underlying reason why some victims fail to participate in criminal cases: the unlawful manipulation and intimidation of victims by defendants while the case is pending.

In 2001, a victim in a domestic violence case reported some unsettling experiences to a victim/witness specialist in the Milwaukee District Attorney’s Office. The victim claimed that during the pretrial phase, while her abuser was in jail awaiting trial, his friends were following her and appearing at her workplace and home.

“She expressed a great deal of fear,” recalls Assistant District Attorney Paul Dedinsky, who leads the office’s Domestic Violence Unit. “We approached the jail and requested a check of the offender’s visitor logs to find out who visited him while in custody. The sheriff’s department told us, ‘Sure, not only that, you can check his phone calls. We have a new system—it’s digitized and you can actually listen to his phone calls’” (see boxes on Legal Aspects of Recording Phone Calls on page 4, Wisconsin Statutes Related to Witness Tampering on page 5, and Legal Primer on the Admissibility of Inmate Jail/Prison Recordings on page 15).

Reviewing the recorded telephone conversations, the district attorney’s office found that the defendant had solicited three of his friends to find the victim and kill her so that she couldn’t testify against him at trial. The defendant was charged with solicitation to commit homicide, convicted, and sentenced to more than 20 years in prison.⁴

Background on Milwaukee

Milwaukee County, Wisconsin, is a midsize jurisdiction of some 900,000 residents (590,000 within the City of Milwaukee) that has long been a leader in responding to domestic violence. In 1989, Wisconsin became one of the first states to pass mandatory arrest laws. In 1994, District Attorney E. Michael McCann adopted a “no-drop” prosecution strategy to move cases forward on the level of evidence rather than relying solely on victims’ willingness to testify. Soon thereafter, to meet a soaring number of domestic violence case filings, the Milwaukee County Circuit Court system established the first of what would eventually become three misdemeanor courts dedicated solely to handling domestic violence crimes. During the last five years of the JOD project, the district attorney’s Domestic Violence Unit reviewed between 8,200 and 10,400 charges a year, for an annual average of approximately 5,000 charges. Like many jurisdictions, Milwaukee County also has a number of victim/witness specialists in the district attorney’s office who provide victims with information about the criminal justice process, assess their particular needs for support, and provide links to appropriate community agencies.



“Between 80 and 90 percent of the time when we were able to locate phone calls, we would find criminal behavior that resulted in criminal charges.”
— Assistant District Attorney Paul Dedinsky

⁴ Interview with Paul Dedinsky, March 23, 2005.

Legal Aspects of Recording Phone Calls

The monitoring of inmate telephone calls in jail and prison facilities is not automatically prohibited by either federal or state law governing electronic surveillance if it is carried out in a systematic, consistent fashion in accordance with published rules or policies and if procedures have been communicated to the inmate. At the Milwaukee County Criminal Justice Facility and the Milwaukee County House of Correction, written notification about phone recordings is given to inmates at booking, and all phone calls made by inmates are preceded by an automated message informing both parties that their conversation is “subject to monitoring and recording.”

Information obtained through these phone calls is legally admissible in court and can be used against a defendant. However, careful attention should be directed to procedures for screening attorney calls and ensuring that they are not monitored or taped. According to Deputy Sheriff Vickie Strachota of the Milwaukee County Sheriff’s Office, most defense attorneys in the county come to the jail facilities in person rather than take phone calls from their clients who are in custody. Nevertheless, the sheriff’s department has established a procedure to allow inmates to speak to their attorneys over the phone without being recorded. Inmates must submit the phone number in advance to jail staff who verify that the number is that of an attorney; calls to those numbers then take place confidentially in restricted disciplinary areas of the facilities.

This case alerted officials to the fact that significant numbers of domestic violence defendants abuse their telephone privileges while in custody. It also resulted in targeted efforts by the district attorney’s office to review jail-house phone recordings of domestic violence defendants and to prosecute those who had engaged in witness tampering.

“Especially on our felony cases,” says Dedinsky, “it appeared that between 80 and 90 percent of the time when we were able to locate phone calls, we would find criminal behavior that resulted in criminal charges.” The charges ranged from bribery for defendants who offered money in exchange for altered testimony, to intimidation for defendants who threatened victims or tried to dissuade them from testifying.

Jeffrey Greipp, a prosecutor who worked on felony domestic violence cases and who advanced the effort to prosecute cases of victim and witness intimidation, says, “We’re just now uncovering how severe the problem is. When we look at these recordings, we get a tremendous insight into the abuse that victims are going

through.”⁵ Recorded conversations may reveal apologies or other evidentiary admissions of guilt. They may also uncover threats of future violence by the defendant, friends or family of the defendant, or someone hired by the defendant.

The following excerpts from taped conversations from the Milwaukee County Jail show a variety of ways in which a defendant’s own words can help secure a conviction.

Defendant admission of guilt: “I never seemed to know where I hit you at. You notice that? Honey, I was so scared that that was your eye that made that noise. Do you hear me?” (Referring to the sound of the victim’s tooth breaking when he punched her in the face.)

Defendant directing victim to stay out of court: “All right, this is what you are going to do. Under NO circumstances WHATSOEVER show up at court is what you’re going to do. If you show up, I’m f*cked. If you don’t show up they can’t do sh*t. Stay home.”

⁵ Interview with Fox News, October 2002. Assistant District Attorney Greipp’s comments, along with illustrative excerpts from inmate telephone call recordings, are included on the DVD at the back of this report.

Defendant persuading a friend to loan him money to hire a hit man:

“Yeah, I’m not going down like that. She’s gettin’ it. I don’t give a f*ck. I’m doing time, she’s gonna get it for it. That’s 300 dollars and I told him I want some teeth. He said okay. Said he’d drop ‘em off.”

Defendant offering to pay off victim and witnesses:

“If they do come to court, tell them to say that they don’t remember what happened. I don’t care if you have to give them 100 dollars a piece not to come. It’s cheaper than me doin’ the damn time.”

Witness tampering charges address such attempts by defendants to influence their cases (see box on Wisconsin Statutes at right). The impact of using jailhouse recordings cannot be overstated. Lacking other evidence to support a conviction, many cases would be dismissed without these recordings. (For more information about admissibility of evidence, see box on Implications of *Crawford v. Washington* on page 6.) With this evidence, a defendant’s own words often secure a conviction. Most cases never even proceed to a jury trial, as the majority of defendants plead guilty rather than face an open court with such damaging evidence. Those defendants who do choose to go to trial with taped evidence must contend with the district attorney’s office’s perfect record of convictions for cases in which taped conversations have been introduced.

Targeting Cases

The district attorney’s office considers a number of factors in determining whether to screen a defendant’s jailhouse calls for evidence of witness tampering. Serious cases, especially those in which the victim does not want to participate, are usually flagged.⁶ Cases involving defendants with a history of dismissed charges involving domestic violence are also targeted. Assistant District Attorney Jeremy Resar notes that these are often the cases in which “the most manipulative offenders, the people working as hard as they can behind the scenes, are the people who don’t get convicted.” Cases in which a victim has a history of not cooperating with the prosecution—by not appearing at scheduled trial dates, for example—definitely signal the need for screening. The victim/witness specialists working in the district attorney’s office help to identify cases in which witness intimidation may be occurring. As in other jurisdictions, the victim/witness staff help protect the interests of victims and witnesses in criminal cases. They also assist both victims and prosecutors throughout the prosecution phase of the case. Their familiarity with the dynamics of domestic violence and their ongoing contact with victims make them well attuned to the tactics of intimidation.

⁶ To determine what constitutes a serious case, prosecutors use a variety of factors. These include but are not limited to the level of physical injury, threats to kill, use of weapons, the level of a victim’s fear, and the offender’s previous history of abuse.

Wisconsin Statutes Related to Witness Tampering

940.42; Intimidation of a Witness; misdemeanor
Preventing or attempting to prevent any witness from giving testimony.

940.44; Intimidation of Victims; misdemeanor
Preventing or attempting to prevent a crime victim from reporting the crime or assisting in the prosecution of the crime.

940.43; Intimidation of Witnesses; felony
Violation of 940.42 accompanied by the threat of, or actual, violence against a witness, or a previous conviction on 940.42.

940.45; Intimidation of Victims; felony
Violation of 940.44 accompanied by a threat of, or actual, violence against a victim, or a previous conviction on 940.42-940.45.

939.30; Solicitation to Commit a Felony; felony
With the intent that a felony be committed, advises another to commit that crime.



“The most manipulative offenders, the people working as hard as they can behind the scenes, are the people who don’t get convicted.”
— Assistant District Attorney Jeremy Resar

Victim/Witness Specialist Jessica Strand recounts one case in which a single message from the victim was enough to signal that the defendant had contacted her. The victim suddenly switched from being cooperative and wanting her abusive husband to get help to saying, “I’m not going to participate. It’s against my religion.” Screening the recordings of her husband’s jailhouse calls confirmed that he was using intimidation to persuade her not to appear in court.

“He was telling her all these horrible things, like, ‘This is your fault.’ ‘I have every right to beat you.’ ‘You shouldn’t have told the police.’ ‘Why did you tell them all that?’” Strand recalls. The case was ultimately prosecuted without the victim’s testimony, and the husband was found guilty.⁷

Implications of Crawford v. Washington¹⁰

Prosecutors who rely on evidence-based prosecution in domestic violence cases must contend with the effects of the U.S. Supreme Court’s decision in *Crawford v. Washington* (2004), which reformulated the standard for determining when hearsay statements are admissible in criminal cases under the Confrontation Clause of the Sixth Amendment to the Constitution. Prosecutors can use jailhouse recordings to establish that a defendant is responsible for the state’s inability to procure the witness for confrontation; in such instances, the defendant effectively waives his or her right to confront the witness. “You can’t threaten or coerce someone not to come to court to testify and then, when they don’t come, say that you’re entitled to confront that witness,” explains Assistant District Attorney Jeremy Resar. Jailhouse recordings “have played a huge role in assisting us to show that, while the defendant has a right to confrontation, he’s waived that right through his efforts to secure the witness’ nonpresence in court.”

In some cases, prosecutors learn about intimidating calls directly from the victim. The boyfriend of one victim threatened her while he was being held in jail for beating her and knocking out two of her teeth. The victim told the district attorney’s office that the defendant would call and say “if he would go down, I would go down.” She provided prosecutors with the date and time of every phone call she received, which made it easy for them to pinpoint the relevant recordings. Prosecutors played the recordings in court, won the case, and sent the defendant to prison.⁸

Collecting Evidence

Once a case has been selected for investigation of witness tampering, prosecutors submit a written request to the Milwaukee County Sheriff’s Office for recordings of phone calls made by the defendant while in custody.⁹ Deputy Sheriff Vickie Strachota, custodian of

records for the office, retrieves the recordings using the search parameters (e.g., phone number, date, and time of call) provided by prosecutors. She then formats and saves the recordings as digital audio files on compact discs for use on a computer with speakers. Two to three years of recordings can be accessed through the system, which is currently provided through a contract with Sprint. Fifty hours of phone

⁷ Interview with Jessica Strand, December 17, 2004.

⁸ Fox News broadcast, October 2002.

⁹ The Milwaukee County Sheriff’s Department provides the jailhouse phone recordings to law enforcement agencies including probation, parole, and the district attorney’s office, as a law enforcement tool. However, the recordings are not considered open records. Defense attorneys and inmates must seek a court order to access the recordings, although prosecutors often work cooperatively with defense attorneys to share this information.

¹⁰ For more information, see “‘Though Justice May Be Blind, It Is Not Stupid’: Applying Common Sense to *Crawford v. Washington* in Domestic Violence Cases” by Adam M. Krischer in *The Voice*, vol. 1, issue 1, November 2004, from the American Prosecutors Research Institute’s Violence Against Women Program.

recordings can be retrieved and burned onto a disc in a matter of a few minutes depending on the hardware used.¹¹

Once the recordings have been retrieved, prosecutors screen the calls for evidence of threats, intimidation, or admissions of guilt. This can be a labor-intensive undertaking, as there can be hundreds of hours of calls in any given case. For example, there were more than 400 calls in the case cited on page 6, in which the victim claimed that cooperating with the prosecutor was against her religion.

“It’s not that we didn’t use this type of evidence previously, just never to the extent that we are now utilizing it,” says Dedinsky. “Right now, the prosecutors are forced to collect the evidence themselves. We could use a full-time investigator in our office just to help handle the case flow.” Because the process of listening to hours upon hours of phone calls is so time consuming, prosecutors learn to multi-task, performing simpler job responsibilities as they play the recordings in the background in their offices.¹² When incriminating information is discovered, prosecutors must prepare transcripts of the phone call recordings for the court, as well as excerpts to present as evidence in trial.

Bail Jumping

As part of its focus on the pretrial phase of cases involving domestic violence, the Milwaukee County District Attorney’s Office also seeks to prosecute defendants who “jump bail”—that is, fail to comply with the court-ordered terms of their release from custody.¹³ Lack of compliance may include failure to make court appearances, violation of no-contact orders, use of prohibited drugs or alcohol, or failure to attend court-ordered programs such as alcohol or drug treatment programs.

The most common types of bail jumping by domestic violence defendants are violations of no-contact orders and failure to appear in court. Defendants out on bail may violate no-contact orders to dissuade victims from cooperating with the court process. Dissuading or attempting to dissuade a victim from testifying is a criminal violation of Wisconsin’s Intimidation of Victims statute (see box on Wisconsin Statutes Related to Witness Tampering on page 5).

Defendants who fail to appear for scheduled court appearances violate Wisconsin’s bail jumping statute. In doing so, these defendants also create lengthy delays that impede the state’s ability to prosecute a case. Such delays may increase the strain on victims and reduce their willingness to participate in a case or erode the memories of witnesses. Dedinsky argues that by failing to appear in court, the defendant is manipulating both the criminal justice system and the victim. “It is not just the victim that experiences the abuser’s manipulative ‘power and control’ dynamics,” he says. “In either type of bail jumping circumstance, prosecutors maintain that defendants who jump bail are attempting to undermine the effectiveness of the criminal justice system as well. Offenders must be held accountable for this behavior.”

At a minimum, bail jumping offenses constitute grounds for revocation of bail and a return to custody. Additionally, these incidents may be used as leverage to obtain a guilty plea on the original charge involving domestic violence, an approach that saves



The Domestic Violence Want System, a database of offenders wanted on all misdemeanor crimes involving domestic violence, is accessible to law enforcement officers throughout the state.

¹¹ Interview with Deputy Sheriff Vickie Strachota, July 26, 2005.

¹² Interview with Jeremy Resar, March 29, 2005.

¹³ Wisconsin Statutes. § 946.49; Bail Jumping.



The Family Violence Unit investigates between 600 and 700 domestic violence cases each year.

No-Contact Orders

The criminal justice system commonly seeks to protect victims and witnesses prior to trial by issuing no-contact orders. These orders usually are initiated as a condition of bail and require defendants to stay away from those they are accused of harming. The orders remain active throughout the pretrial phase of a case and may be extended if necessary. They differ from civil protection orders, which are initiated by the victim (or plaintiff) in a civil court. Civil protection orders can be sought regardless of any pending criminal case; no-contact orders are sought as a result of a pending criminal justice action. Milwaukee County issues no-contact orders in more than 99 percent of all criminal cases involving domestic violence.

victims from the strain of testifying. The first goal for prosecutors is to work with victims and victim advocates to obtain a conviction on the original charge. If the first goal is unsuccessful, prosecutors can consider pursuing a new criminal charge based on the bail jumping offense. In such instances, the prosecutor should introduce information about a defendant's history of abusive and manipulative behavior to argue for a sentence with conditions specially designed to address domestic violence. "A person's character is a critical factor in the court's ruling at sentencing," Dedinsky explains.

The Milwaukee prosecutor's office does not have set policies for making sentencing recommendations in bail jumping cases involving domestic violence. Rather, individual prosecutors consider the seriousness of the charge and assess the offender's willingness to change. In minor cases involving offenders who appear willing to change their behavior, prosecutors will argue for a sentence that focuses on interventions tailored to address domestic violence. In more serious cases, they recommend prison time.

Discovering Violations of No-Contact Orders

Offenders typically jump bail by violating their no-contact orders. They may do this by visiting or calling a victim's home or workplace or by sending notes, cards, e-mail, or messages either directly or via friends or family members. These behaviors may be intended to intimidate victims and dissuade them from cooperating with the court process. Because offenders have much to lose if convicted, violations of no-contact orders can pose a particularly dangerous situation for victims. Moreover, unlike other forms of bail jumping—such as failure to make scheduled court appearances or failure to attend court-ordered programs—violations of no-contact orders can be difficult to discover.¹⁴ Some victims choose to not report these violations (often in an effort to protect themselves), and there is no single agency charged with monitoring compliance (see box on No-Contact Orders at left).

The Milwaukee District Attorney's Office typically learns about violations of no-contact orders from one of three sources: law enforcement agencies, including the Milwaukee Police Department; the Pretrial Monitoring Program, which is part of a specialized court consolidating all pretrial proceedings for misdemeanor domestic violence cases; or victims themselves (explained in the following section).

The Family Violence Unit (FVU) within Milwaukee's police department frequently investigates and responds to violations of no-contact orders (see box on the Domestic Violence Misdemeanor Want System on page 9 as a tool for law enforcement to respond to no-contact order violations). The FVU, established in the department's Sensitive Crimes Division in 2003, is comprised of 33 highly trained officers who handle serious domestic violence misdemeanors and all felony domestic violence crimes, as well

¹⁴ Pretrial organizations like Wisconsin Community Services and agencies including the In-Home Detention and Electronic Monitoring Program, the Mental Health Intervention Unit, and the Alcohol and Other Drug Abuse Program help to monitor a defendant's compliance with court orders to attend programs and remain free from substance abuse.

as cases involving special circumstances such as strangulation or victims who are elderly or pregnant. The FVU investigates between 600 and 700 of the approximately 10,000 domestic violence cases that the department handles each year.

As a domestic violence victim liaison in the FVU, Kara Garcia provides victims with referrals for their domestic violence related needs and reports any violations of no-contact orders. Garcia explains that she can offer to pick up a victim who wants to report a violation and bring her to the Sensitive Crimes Division for an interview with an officer. “And,” she adds, “maybe the victim can speak with the officer who investigated the original incident, which is very helpful because then she feels more comfortable because she’s dealing with a police officer who knows the history.” FVU officers then conduct a thorough investigation, write a new incident report, and inform the district attorney’s office of the alleged violation.

Because some victims do not report violations of no-contact orders (often because they have been threatened or intimidated), Garcia must be on the alert for clues that the defendant is manipulating the victim. When she speaks with victims, she listens for indications that the defendant may have contacted the victim. “I listen to how they say things,” she explains. If a victim uses technical legal language, for example, it might be a sign that someone has been speaking with the victim about the case. “And if it wasn’t me and it wasn’t the DA,” Garcia says, “then it’s probably coming from the defendant.” When Garcia suspects that the defendant has been calling the victim, she contacts the district attorney’s office and suggests that they locate the jailhouse phone recordings for that particular defendant.

Communications between victims and the domestic violence victim liaison are not confidential.¹⁵ When Garcia speaks with victims for the first time, she carefully explains her role and the limits on confidentiality. She states clearly that if she learns about a violation of a no-contact order in an open criminal case, she is required to give this information to the district attorney’s office—even if the victim asks her not to tell anyone. When this happens, the violation is documented in the victim’s case file. That way, if it does not result in new charges, the district attorney can still present it in court at a later date.

Wisconsin’s Domestic Violence Misdemeanor Want System

The Domestic Violence Misdemeanor Want System, which was implemented in 2003, helps law enforcement respond to violations of no-contact orders. The system features a database of offenders wanted on all misdemeanor crimes involving domestic violence, including violations of no-contact orders. This database is accessible to law enforcement officers throughout the state. “We actually had to contact the state of Wisconsin and get it approved because in the past, normally you could only put a want in the system if it was a felony,” explains Detective JoAnne Blake of the Milwaukee Police Department’s Family Violence Unit.

Prior to the development of the database, if a suspect left the scene and could not immediately be located, only the investigating officers would know, until an arrest warrant was obtained, that the individual was wanted for a misdemeanor offense involving domestic violence. Now, if the offender is later stopped for a separate offense, such as a traffic violation, the officer can run a check on the individual, learn of a no-contact order violation or other outstanding charge, and make an arrest. “From a victim safety standpoint,” Blake says, “this development is huge. It’s the difference between having that individual out of custody for two or three days, versus two or three hours. You know the first couple of days there’s still the intense emotion going on where they have that ability to re-offend.”

¹⁵ This is also true of communications between victims and victim/witness specialists in the district attorney’s office. For confidential services, victims are referred to nonprofit organizations.



Because some victims do not report violations of no-contact orders, Domestic Violence Victim Liaison Kara Garcia must be on the alert for clues that the defendant is manipulating the victim.

The Pretrial Monitoring Program (PMP), another JOD innovation, provides a second way for prosecutors to learn about violations of no-contact orders. The PMP is reserved for defendants with a previous domestic violence conviction who are not under the supervision of a probation or parole agent when the new charges are made. Defendants in this program are monitored by designated bail monitors who, should they learn of a violation, alert both law enforcement and the district attorney's office. (Monitors also can address violations by submitting a memorandum directly to the court, which results in a hearing on the alleged violation within 48 hours.)¹⁶

Key Practices

This section presents key practices for the successful prosecution of bail violations, witness tampering, and intimidation charges in the pretrial phase of domestic violence cases. While these practices are in some respects particular to Milwaukee, with minor adaptations they are likely to prove useful in other jurisdictions as well.

Establishing Communication and Collaboration Among Agencies

Interagency collaboration is essential to enhancing victim safety and ensuring that defendants are held accountable for their behavior. The agencies involved in this work—including law enforcement, the courts, and the nonprofit victim services agencies—should establish pathways for communication and be clear about what they expect from each other.

Improving communication can be accomplished in several ways. For example, the domestic violence victim liaison in the Milwaukee Police Department's Family Violence Unit (FVU) enhances relationships between law enforcement and victims, while also serving as a link to prosecutors. (As previously discussed, the liaison helps victims report violations of no-contact orders.)

The liaison and other officers in the FVU maintain close working relationships with the domestic violence prosecutors in the district attorney's office. Victim Liaison Kara Garcia and her colleagues often meet with prosecutors to discuss cases and "bounce ideas off each other."

"That way," she says, "I have an understanding of what they're going to need from the victim, officers have an understanding of what kind of follow-up they're going to need to do, the district attorney knows what can be expected from us, and we know what to expect from them."

Educating Law Enforcement

Law enforcement personnel require specialized training on issues related to domestic violence. This training helps officers respond appropriately to violations of no-contact orders and ensures that evidence is collected and documented to facilitate prosecution. Understanding domestic violence dynamics also prepares law enforcement officers for the frustration they may experience when victims disengage from the legal process or re-establish contact with offenders.

¹⁶ See the JOD publication *Pretrial Innovations* on Milwaukee's Pretrial Monitoring Program for more detailed information about the PMP and other pretrial innovations in domestic violence cases.

In 2003, the Milwaukee District Attorney's Office partnered with the Milwaukee Police Department and the Task Force on Family Violence, a nonprofit victim services agency, to design and facilitate an eight-week training program for more than 1,000 law enforcement officers. The program covered topics such as Wisconsin's mandatory arrest policy (see box on Background on Milwaukee on page 3), how to determine the primary/predominant physical aggressor in a domestic conflict to avoid dual arrests, how to conduct thorough investigations, and how to collect evidence. The training was presented as a tool for homicide prevention. Approaching the issue from this perspective, Assistant District Attorney Paul Dedinsky explains, allowed trainers "to focus on the abuse while disarming potential judgments of victim-blaming."

Organizers of the training program found jailhouse recordings to be an excellent tool for training police officers about the dynamics of domestic violence. The recordings illustrate, in a very real way, how offenders intimidate their victims.

Victim intimidation is something that law enforcement officers readily understand as it is common in their work with gangs, explains Assistant District Attorney Jeremy Resar. "If there's an old woman on the block who observes a [gang] shooting and then becomes uncooperative, everybody knows why that is and no one questions it. No one is angry at that old woman for not wanting to testify and put her life in danger." Once law enforcement personnel understand the similar kind of pressure domestic violence victims face, Dedinsky says, "officers are less inclined to blame victims when they don't appear in court or recant at trial."

Key components of the training sessions have been incorporated into the standard curriculum at the police academy, and FVU staff routinely conduct in-service trainings to ensure that officers' knowledge is up to date.

Educating Victims

Victims can play a critical role in obtaining convictions for bail jumping and witness tampering by documenting and reporting violations. Advocates, prosecutors, and law enforcement officials must therefore ensure that victims understand what constitutes evidence and the importance of preserving it. The district attorney's office and police department in Milwaukee seek to educate victims about the parameters of no-contact orders and encourage victims to report violations. In particular, they stress that no-contact orders prohibit the offender from contacting the victim directly or through a third party, such as a friend or family member.

Victim/Witness Specialist Jessica Strand advises victims to call the police whenever they receive apology letters or phone calls. Resar says he makes a similar point in his initial conversation with victims. He seeks to prepare them for the fact that the offender "is going to call or write to them. Despite the fact that there is a no-contact order, this is going to occur, and they need to inform the police as soon as it occurs."

While a victim may experience incredible emotional frustration upon receiving a phone or e-mail message and may feel inclined to erase it immediately, the message may be crucial to securing a charge and conviction. Domestic violence victims,



Victim/Witness Specialist Jessica Strand advises victims to call the police whenever they receive apology letters or phone calls.

Informing Defendants of the Consequences of Bail Violations

Just as victims are educated about the consequences to defendants who violate no-contact orders and other bail conditions, defendants themselves need to be thoroughly informed about the criminal justice response to their actions. In Milwaukee County, this information is conveyed by judges or court commissioners charged with setting the terms and conditions of bail. Using easily accessible language and real-life scenarios, these conditions are reinforced by public defenders and the Pretrial Monitoring Program's bail monitor, who help defendants understand the behaviors that constitute a violation and the consequences of these violations.

Terese Dick, Deputy First Assistant for the State Public Defender's Office of Wisconsin, has played an active role representing the defense bar in Milwaukee County's Judicial Oversight Demonstration Initiative. Through her involvement, Dick argues that promoting victim safety is not only good for victims, but also that not promoting safety is actually detrimental to her clients. Thus, Dick stresses to her clients that they need to avoid bail violations in any form, as such violations weaken their bargaining power, may lead to new and more serious charges, and may be admissible evidence should the case go to trial.

Defendants who qualify for the Pretrial Monitoring Program are given an intake interview with a bail monitor who reviews all conditions of bail, paying special attention to the no-contact order and the consequences for violating it. The monitor explains that police will accompany him or her during field compliance checks and that any violations they discover can result in immediate arrest.¹⁷

especially those involved in stalking cases, should be strongly encouraged to preserve such messages and other evidence of abusive and harassing conduct and turn it over to law enforcement. At the same time, advocates, law enforcement, and prosecutors must continually address victims' legitimate concerns about the possible consequences of reporting violations, including the possibility of retaliation from the offender or the offender's friends or family members.

To teach victims about evidence collection, some prosecutors hand out plastic zip-lock bags to victims. These bags are identical to the ones that police use for evidence collection. Prosecutors then ask victims to put any letters, notes, or other written communication they may receive from defendants in the bags. "Sometimes we'll get huge bags full of letters from victims," Strand says. Victim Liaison Kara Garcia urges victims to bring her any letters—including envelopes—that they receive from offenders. In some cases, she offers to have an officer in the Sensitive Crimes Division pick up the evidence. Dedinsky admits that this approach is "a little outside of the box, but we have to constantly think of creative ways to educate victims about what's evidence and what's not evidence. We're trying to get victims in the habit of actively collecting information and working with us, all with the goal of victim safety in mind."

For a variety of reasons—ranging from fear of retribution to strong emotional bonds and shared child custody—not all victims are willing to report violations of no-contact orders. In some cases, they may even initiate contact with the defendant. In such situations, Strand says she tries to help victims understand that by initiating contact they may make matters worse for the offender. "You will not get in trouble for contacting him," she tells them, "but if he responds at all, that's a violation of the no-contact order

and then he can get in trouble." Additionally, the defendant may view this contact as a sign of the victim's weakening resolve to hold him accountable—thus creating an opening for him to dissuade her from pursuing the case (see box on Informing Defendants of the Consequences of Bail Violations at left).

¹⁷ For more information on the Pretrial Monitoring Program, see *Pretrial Innovations: Supporting Safety and Case Integrity* (part of the Enhancing Responses to Domestic Violence series).

Special Considerations

Obtaining convictions for pretrial violations associated with a domestic violence case is not without controversy. In developing a strategy to pursue witness tampering and intimidation and bail jumping, prosecutors should consider the viewpoints of victims, public defenders, and victim advocates.

Calibrating Responses

A key challenge for prosecutors is deciding which violations of no-contact orders warrant the full force of the criminal justice system and which require more nuanced action. All victims want the violence to stop, but not all victims see the criminal justice system as the means to achieve this goal. Fear, guilt, economic hardship, even concern for the defendant's well-being, can lead victims to maintain contact with their abusers. Such contact challenges the enforcement of no-contact orders and requires considerable discretion from those charged with helping victims.

Consideration for Victims

When prosecutors pursue a bail jumping violation without considering the potential consequences for the victim, that victim may feel resentful or even angry. Therefore, trained legal staff who understand the dynamics and complexities of intimate partner violence are essential. When the criminal justice system attempts to stop future violence by enforcing separations, community resources must be made available to counteract the unintended consequences of the separation, such as a victim's loss of income, housing, or health benefits if a family's principal breadwinner is incarcerated.

The Defense Bar

Wisconsin state law is clear in favoring the admissibility of recorded jailhouse conversations at trial. Yet some defense attorneys criticize the practice of securing a conviction for bail jumping or witness tampering in cases where the underlying charge involving domestic violence is dismissed. Some defense attorneys consider this practice to be overzealous prosecution and a miscarriage of justice. Many also feel that if a victim recants, the case should be dropped immediately. On the other hand, prosecutors will argue that ignoring the intimidation on the tapes would constitute the greater miscarriage of justice.

Avoiding Victim-Blaming

Some advocates fear that victims who have been reluctant to help the prosecution pursue its case may themselves become the targets of frustrated prosecutors when jailhouse recordings contain information about victims' illegal behavior, such as drug use or willingness to commit perjury. Ultimately, the decision to press charges against a victim for evidence revealed on jailhouse recordings is left to the discretion of the district attorney. Cases of victim prosecution are extremely rare; as of this writing, Milwaukee County prosecutors have never used jailhouse recordings to pursue a case against a victim.

Conclusion

When the Office of the District Attorney in Milwaukee County began focusing on prosecuting pretrial violations in domestic violence cases, it had several goals in mind. It wanted to reduce the number of cases dismissed due to victim intimidation. It wanted to stop batterers from manipulating the criminal justice system. And it wanted to protect victims from further psychological and physical harassment.

By collaborating with victims, law enforcement agencies, victim advocates, and court officials; by educating law enforcement about the dynamics of domestic violence; and by helping victims understand the importance of documenting and reporting offender violations, those prosecutors were able to meet those goals. As a result, they are providing more effective criminal justice interventions in domestic violence cases.

Legal Primer on the Admissibility of Inmate Jail/Prison Recordings*

Generally speaking, federal law prohibits the “interception” of telephone calls absent a particularized court order. (18 U.S.C. §§2510 (1970) et seq) The following two exceptions apply to the interception of inmate telephone calls at correctional institutions.

1. LAW ENFORCEMENT ORDINARY COURSE OF POLICIES & DUTIES

Federal courts have interpreted 18 U.S.C. § 2510(5)(a)(ii) to exempt the recording of inmate phone calls in institutional settings from the federal wiretapping statute. Police agencies are deemed to have an interest in the routine recording of incoming and outgoing calls to ensure accuracy, verify information, and log emergency and non-emergency calls. When conducted as part of an institutionalized, systematic, ongoing, consistent policy at the prison, the monitoring of phone calls is considered anything but routine and random. Its purpose is to ensure the security and orderly management of the institution. Several cases provide additional information:

United States v. Lewis, 406 F.3d 11 (1st Cir. 2005); *United States v. Friedman*, 300 F.3d 111 (2d Cir. 2002); *United States v. Correa*, 220 F.Supp2d 61 (D.Mass. 2002); *Smith v. Dept. of Justice*, 251 F.3d 1047 (D.C. Cir. 2001); *Amati v. City of Woodstock*, 176 F.3d 952 (7th Cir. 1999); *United States v. Van Poyck*, 77 F.3d 285 (9th Cir. 1996); *In re State Police Litigation*, 888 F.Supp. 1235 (D.Conn. 1995), aff'd, 88 F.3d 111 (2d Cir. 1996); *United States v. Sababu*, 891 F.2d 1308 (7th Cir. 1989); *United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989); *Crooker v. U.S. Dept. of Justice*, 497 F.Supp. 500 (D.Conn. 1980); *United States v. Paul*, 614 F.2d 115 (6th Cir. 1980).

2. CONSENT

In 18 U.S.C. § 2511(2)(c), an exception for consent is outlined. Federal courts addressing the consent exception in the prison setting have overwhelmingly concluded that an inmate has given implied consent to electronic surveillance when notice is provided that the telephone call is subject to monitoring and recording, and nonetheless, the inmate proceeds with the call. Federal case law repeatedly expresses the proposition that prison inmates have few expectations of privacy in their communications (See *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)) and no expectation of privacy in calls to non-attorneys placed on institutional telephones. The privacy of inmates is outweighed by the institution's need for safety and security. In sum, “meaningful notice” equals “implied consent.” Examples of notice include signed acknowledgement forms, an informational handbook or prison manual, orientation session, posted signs, or recorded warnings heard by the inmate. Several cases address consent:

United States v. Hammond, 286 F.3d 189 (4th Cir. 2002); *United States v. Footman*, 215 F.3d 145 (1st Cir. 2000); *United States v. Workman*, 80 F.3d 688 (2d Cir. 1996); *United States v. Van Poyck*, 77 F.3d 285 (9th Cir. 1996) *United States v. Horr*, 963 F.2d 1124 (8th Cir. 1992); *United States v. Daniels*, 902 F.2d 1238 (7th Cir. 1990); *United States v. Willoughby*, 860 F.2d 15 (2d Cir. 1988); *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987).

*Note: This “legal primer” was created by Assistant District Attorney Paul Dedinsky as a starting point for your own legal research, not as an exhaustive review of this area of law. It should not be considered as a replacement for thorough and solid legal research. Each state’s or jurisdiction’s case laws may differ markedly in analysis from the above analyses and conclusions. Every attorney is individually responsible for the accuracy and overall quality of his or her own work.

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